

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES THOMAS JETT,

Defendant-Appellant.

UNPUBLISHED

November 13, 2003

No. 239464

Wayne Circuit Court

LC No. 00-007624-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE BROWN,

Defendant-Appellant.

No. 239466

Wayne Circuit Court

LC No. 00-007624-03

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

In this consolidated criminal case, in Docket No. 239464 defendant James Jett appeals as of right from his conviction of first-degree felony murder,¹ two counts of assault with intent to do great bodily harm,² and felony-firearm.³ In Docket No. 239466, defendant Eugene Brown appeals as of right from his conviction for first-degree felony murder, and felony-firearm. We affirm.

¹ MCL 750.316b.

² MCL 750.84.

³ MCL 750.227b.

I. Basic Facts And Procedural History

A. Overview

This case stems from the December 23, 1999, robbery and shooting death of Jeffrey Burda, an ice cream delivery person. Lacey Adrow eventually confessed his involvement in the crime and pleaded guilty to second-degree murder. In turn, Jett and Brown also confessed. However, on appeal both Jett and Brown assert, among other things, that their confessions were not voluntarily given. Jett couches his argument in terms of a denial of effective assistance of counsel, while Brown only challenges the trial court's decision to admit the confession.

B. Jett's Confession

Below, Jett moved to suppress his confession. Jett's brief noted, simply, that "the statement was not voluntarily given to the law enforcement officer, that therefore it should be suppressed and ruled inadmissible at trial." A *Walker*⁴ hearing was held over the course of several days spread over two months. From the context of the hearing, it was apparent that Jett was arguing that he did not understand his rights, and that he was intoxicated at the time he was alleged to have waived them.

At the hearing, Terrill Shaw, an investigator with the Detroit police department, testified that he spoke with Jett on three occasions: once when Jett was arrested on January 1, 2000, and when he took two statements from Jett. Jett did not appear to be under the influence of intoxicants or narcotics. Although Shaw saw marijuana in the house where Jett was arrested, Shaw could not smell any marijuana on him, and Jett displayed no problems with his motor skills when he walked to the patrol car. Jett never complained to Shaw about any illness and he did not appear injured. During their first conversation, Shaw provided Jett with two cups of water and two cigarettes. Jett never indicated any need to go to the bathroom. Shaw was aware of the fact that, at the time of the interview, Jett was nineteen years old.

After Jett was arrested at approximately noon, he was taken to the fifth floor of the police station. Shaw met with Jett at approximately 3:00 p.m., when he made Jett aware of his *Miranda*⁵ rights. Jett began to read his *Miranda* rights aloud, but "stumbled over some of the words"; Shaw assisted him in reading them. Jett initialed after each right on the form to indicate that he understood them. At 3:30 Jett began his first statement, which took three pages, and indicated that he was involved in the crime. At the conclusion of the statement, Jett read the statement and made a correction where appropriate. Jett signed the statement to indicate that he read it and that it was accurate.

Later that day, Joan Miller, of the special assignment squad, informed Shaw that Jett wanted to speak with him again. Shaw and James Fisher, his partner, went to the interrogation room and Jett was "sitting on the table smoking a cigarette, drinking his water." According to

⁴ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

⁵ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed2d 694 (1966).

Shaw, Jett told him “yeah, I shot that white boy.” Jett told Shaw that he “wanted to get this off [his] back” so Shaw reread Jett his *Miranda* rights, and Jett initialed and signed the forms to indicate that he understood them. Jett began giving his second statement at 10:49 p.m. on January 1, 2000. Shaw asked why Jett had been untruthful in his earlier confession and Jett replied, “I was scared.” Shaw noted that in Jett’s first statement, he shifted the blame for the victim’s shooting on someone else; however, in Jett’s second statement, he accepted responsibility as the shooter.

On cross-examination, Shaw conceded that he did not make it clear that he was taking Jett’s statement because Jett was suspected of murder. Shaw also added that he spoke with Adrow, and he believed that Jett was involved in the shooting. Shaw was also questioned about what he knew about Jett’s education. Shaw was aware that Jett was enrolled in special education classes, which meant he was “slower than other people.” However, Shaw reiterated that he asked Jett if he could read and write and Jett answered affirmatively. Shaw also denied that Jett urinated on himself, although Jett later testified that he urinated on himself because Shaw would not allow him to use the bathroom.

James Fisher, Shaw’s partner, was also called. Fisher’s testimony mirrored Shaw’s in that, when Jett was arrested, Fisher could not detect the smell of marijuana, and observed nothing to indicate that Jett was in any way impaired by drugs. Moreover, Fisher doubted that Jett urinated on himself because he wasn’t allowed to use the bathroom. Fisher continued that, during Jett’s second interview, Jett voluntarily blurted out that he killed the victim.

Darren Johnson, an officer with the Detroit police department, testified that he arrested Jett on an unrelated narcotics charge on February 17, 2000. As is his usual practice, Johnson asked Jett if he could read; when Jett responded that he could, Johnson had Jett read his constitutional rights. When asked if Jett had any difficulties, Johnson responded, “none whatsoever.”

Timothy Koltuniak, a psychologist with the Center for Forensic Psychiatry, interviewed Jett and testified that he evaluated Jett to be competent to waive his *Miranda* rights at the time of his confession. Specifically, Koltuniak went through the form detailing Jett’s rights, and asked Jett what each meant. Koltuniak believed Jett’s responses indicated he understood those rights. Koltuniak also administered the Minnesota Multiphasic Personality Inventory (MMPI), as well as other tests. Koltuniak felt that the MMPI results were invalid, as Jett “over-exaggerated many very pathological symptoms, essentially saying that he did experience a lot of symptoms of mental illness and so forth which he has no history of having experienced and which [Koltuniak] didn’t observe during the interview.” Although Jett demonstrated “rather low” intelligence – a verbal IQ of 72, which is within the borderline range of intellectual functioning, and a performance IQ of 64 and a full-scale IQ of 66, both of which are in the mildly mentally retarded range of functioning – Koltuniak believed Jett’s scores underestimated his abilities. Koltuniak stated that Jett was willing to give up on answering questions as opposed to thinking the answers through, which would result in lower scores. Moreover, Koltuniak believed that Jett was trying to portray himself as being of lower intellectual ability than he actually was. Koltuniak noted that Jett’s school records, which evidenced a reading level of early second grade, showed that Jett’s “street survival skills are excellent.” Moreover, according to Koltuniak, Jett was probably aware of his *Miranda* rights from his numerous run-ins with law enforcement; Koltuniak stated that “most people know the *Miranda* rights just from television.”

Jett testified that on January 1, 2000, he was at the house of his friend Laconi Spencer, celebrating New Year's and "smoking marijuana and drinking." Jett had "a couple of blunts" or "marijuana cigar[s]" as well as sharing a half pint of vodka with Spencer. Jett described himself as "blowed" and "intoxicated." At about 10:30 a.m., the police arrived at Spencer's house; according to Jett, he was scared, so he hid in the basement. Eventually, he was taken into custody.

Jett testified that when he arrived at the police station, an officer began to ask him questions about marijuana. However, Jett also stated that the police told him he was wanted for murder. Jett was placed in a dark interrogation room alone for about five and a half hours. Eventually, Shaw entered the room with a box that Shaw told Jett contained a "gun in a Ziploc bag." Shaw told Jett that several people told him that Jett committed a murder. When Jett was shown the constitutional rights notification form, Jett denied that he initialed it. Jett acknowledged, however, that he signed the form. When asked if he read the form, Jett stated that he read at a very poor level. Jett stated that he could read only a couple of the words on the form.

As to the statements with Jett's signature on them, Jett testified that he signed the papers because he was promised that he would be allowed to go home. However, Jett denied that he read what was written on the forms because he "cannot read." According to Jett, when he asked to use the restroom, Shaw indicated that he was going to be allowed to return home; however, Jett was never allowed to go home and he urinated on himself. At approximately 6:00 p.m. that evening, Shaw asked Jett where Brown lived, and then Jett went with police officers to Brown's residence. Jett pointed out the house and was taken back to the police department. On cross-examination, Jett admitted that he had been arrested at least five times before his arrest in this matter, but stated that he was never read his *Miranda* rights on those occasions. According to Jett, the police "just tell you to sign some papers and stick you in a cell."

At the close of the hearing, the parties delivered their arguments to the trial court and the trial court rendered its decision from the bench. The trial court first observed that Jett did not demonstrate that he was intoxicated at the time of his confessions. The trial court found that Jett used alcohol and marijuana, but it did not find that the use of those drugs impaired Jett in any way. The trial court believed that Jett could not read, but that his failure to read had no impact on his ability to knowingly, freely, and voluntarily waive his rights. Accordingly, the trial court allowed the admission of Jett's confession.

C. Brown's Confession

Brown contends that his trial counsel was ineffective for failing to raise the question of his competency throughout the proceedings. Brown alleges that his trial counsel failed to pursue a claim that he was incompetent to stand trial, or that he was legally insane and, therefore, could not be held responsible for his actions. Brown claims that his trial counsel failed to do these things at either the *Walker* hearing challenging the admissibility of Brown's confession, or at trial. Brown believed that significant evidence was available regarding his mental condition, but that none of it was presented in his defense. As Brown observes in his appellate brief, his trial counsel presented no witnesses and offered no evidence during the trial; instead, Brown's trial counsel only made two motions for a directed verdict, which were denied.

After Brown was arrested, the trial court referred him for at least two psychiatric exams. A mittimus entered thereafter reflects that Brown was found competent. On August 10, 2000, the trial court entered an order appointing an independent psychologist to determine whether Brown was competent to waive *Miranda* rights. A *Walker* hearing was also held to determine whether Brown's confession should be suppressed. From the context of the testimony, it is apparent that the hearing did not raise the issue of competency, but rather examined whether Brown's waiver was knowingly and intelligently given.

Shanddalyn Wilson was called as a witness at the *Walker* hearing. Wilson indicated that Brown was the father of her child. On New Year's Eve, 1999, she was with Brown from approximately 8:00 p.m. until approximately 2:00 a.m. on New Year's Day, 2000. Wilson testified that during that time Brown was "high"; Wilson observed Brown smoke two blunts, as well as drink half of a bottle of tequila. The following afternoon Wilson went to Brown's house, where she saw him smoking more marijuana and drinking brandy.

Barbara Simon, an investigator with the Detroit police department, testified that she interviewed Brown on January 1, 2000. Simon observed Brown's physical condition and stated that he appeared "fine, normal." Simon saw nothing to make her think Brown was under the influence of any sort of drug or alcohol. Brown's eyes were neither bloodshot nor glassy, and his speech was not slurred. Simon added there was nothing to suggest any sort of physical injury.

In talking with Brown, Simon learned he was nineteen years of age, and that he was enrolled in the twelfth grade at Osborn High School. Simon had Brown read his constitutional rights aloud to ensure he could read and write. Brown indicated that he understood, initialed each right, and signed the form. Brown did not indicate that he had any questions, and he did not ask for an attorney. Simon took a statement from Brown, which he read to ensure accuracy, and then he signed the statement.

Brown testified that he was arrested on January 1, 2000. On New Year's Eve, Brown was at his mother's house drinking tequila and brandy. Brown estimated that he consumed a fifth of tequila, and a portion of a pint of brandy. In addition, Brown had approximately five "blunts" or marijuana cigars. That evening he drove to his house to sleep; when he woke up the following morning, he resumed drinking the remainder of the brandy, as well as smoking "blunts." A "short time" later, Brown was arrested and taken to police headquarters. Brown testified that he asked for an attorney when he was arrested, as well as when he arrived at police headquarters. On cross-examination, Brown acknowledged a constitutional rights form bearing his initials. Moreover, Brown noted that he had been arrested a year prior for carrying a concealed weapon. When Brown was arrested for that offense, he was advised of his rights, and he waived his right to counsel.

James Fisher, an investigator with the Detroit police department testified that he did not smell alcohol on Brown's breath. Clifford Jordan, also of the Detroit police department, testified that he assisted in arresting Brown and that Brown never requested an attorney. Terrell Shaw, of the Detroit police department, corroborated that Brown never asked for an attorney. Moreover, Shaw did not smell marijuana or alcohol when he arrested Brown.

After hearing the arguments of the parties, the trial court ruled that Brown's statements to the police were admissible. The trial court found that Brown did not ask for an attorney, and that he was not intoxicated. The trial court believed that Brown would not have been able to function had he consumed as much as he indicated. Accordingly, the trial court determined that Brown's confession was "knowingly, freely and voluntarily given."

II. Jett's Confession

A. Standard Of Review

Jett contends that the trial court erred in refusing to suppress his statements to police officers because his waiver of his *Miranda* rights was not knowing and intelligent. We review a trial court's findings of fact regarding a defendant's knowing and intelligent waiver of *Miranda* rights for clear error.⁶ Whether the waiver was made knowingly and intelligently is a matter of law that we review de novo.⁷ We review decisions on whether to admit evidence for an abuse of discretion.⁸

B. Jett's Arguments

Because the trial court record reveals that two confessions were admitted into evidence, we assume that Jett assigns error to the admission of both. Although Jett's brief does not clearly state the basis for challenging the admission of the confessions, from the context of the hearing it was apparent that Jett was arguing that he did not understand his rights, and that he was intoxicated at the time he was alleged to have waived them.

Jett now argues that the trial court's decision to admit the confession was, generally, erroneous. Jett's brief on appeal merely sets forth, in a cursory fashion, that the trial court's findings of fact were clearly erroneous, that the trial court's legal conclusions were erroneous as a matter of law, and the trial court's decision to ultimately admit the confession into evidence was an abuse of discretion. We conclude that "it is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."⁹

A review of the merits of Jett's claims compels the same result. There was no clear error when the trial court found that Jett was not significantly affected by drugs or alcohol, or that Jett was unable to "knowingly, freely and voluntarily" waive his *Miranda* rights. The trial court found that "while [Jett] did engage in some recreational use of both alcohol and marijuana, the testimony was not such that the Court would find that his ability to comprehend or to process

⁶ *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

⁷ *Id.*

⁸ *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

⁹ *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1955).

information was in any way impacted or impaired by that alcohol or the marijuana that he testified that he consumed.” Although Jett testified that he consumed marijuana, none of the police witnesses either smelled marijuana when they arrested him, or observed anything that would suggest that Jett was affected by any drug or alcohol use. Jett’s assertion that he “was blown” merely established a credibility contest, which the trial court resolved against Jett.

Moreover, the trial court did not clearly err in finding that, although Jett may have had difficulty reading, he was able to comprehend the significance of his rights. The trial court observed:

I believe that the rights were read to him. I believe that they were discussed with him. Not only on the occasion when the statement was given in the earlier hours of the day, but also again that afternoon, which would have been the appropriate thing to do if he was going to be talked to again. That he understood his rights as they were given, when they were given.

There was evidence to support this conclusion. One of the detectives who interviewed Jett stated that he initialed and signed the form detailing his rights, and read and approved the statements. Another officer testified that, during his earlier questioning of Jett, Jett had no problem comprehending his constitutional rights. Finally, the independent psychologist testified that he believed that Jett was aware of his *Miranda* rights based on his numerous encounters with law enforcement. Based on this evidence, we cannot conclude that the trial court clearly erred in making its factual findings.

Based on these findings of fact, and considering that Jett offered no other argument as to why his confession should be suppressed, the trial court’s conclusion that Jett “knowingly, freely and voluntarily” waived his rights was not erroneous as a matter of law. Therefore, we conclude that the trial court’s decision to admit that confession does not amount to an abuse of discretion.

III. Brown’s Confession

A. Standard Of Review

Brown contends that his trial counsel was ineffective for failing to raise the question of his competency throughout the proceedings. To properly preserve a claim of ineffective assistance, a defendant needs to object in the lower court and establish a record of facts pertaining to such allegations.¹⁰ Here, Brown failed to make such a motion before the trial court.¹¹ Accordingly, this issue is not preserved for appeal, and our review will be limited to the errors apparent from the record.¹²

¹⁰ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

¹¹ Brown moved for a *Ginther* hearing before this Court, which was denied “for the failure to persuade the Court of the need for remand at this time.” *People v Brown*, unpublished order of the Court of Appeals, October 11, 2002 (Docket No. 239466).

¹² *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

B. Standard for Establishing Ineffective Assistance Of Counsel

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different.¹³ Effective assistance of counsel is presumed, and the defendant bears a heavy burden of showing otherwise.¹⁴ A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial.¹⁵ The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy.¹⁶ This Court will not second-guess counsel regarding matters of trial strategy and, even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight.¹⁷

C. Brown's Mental State

Brown first argues that his trial counsel failed to look at the court file after being substituted as counsel. Brown contends that his counsel failed to investigate and pursue a claim not only of lack of competency to stand trial and lack of competency to waive his *Miranda* rights, but of legal insanity. We find, however, that these assertions are not supported by the record. There is nothing apparent from the trial court file to suggest that Brown's counsel failed to inspect the court file. As for Brown's contention that his trial counsel failed to assert that Brown lacked the competency to waive his *Miranda* rights, the trial court file reveals that Brown's counsel did pursue such a psychological examination. The examiner concluded that Brown was competent to waive his *Miranda* rights.

Based on our review of the record, we believe Brown's argument that his counsel was ineffective for failing to raise the issue of Brown's mental state fails because we conclude that his counsel's actions were actually strategic. The decision whether to present an insanity defense can be an issue of strategy.¹⁸ The record reflects that, after the determination that Brown was competent to waive his *Miranda* rights, Brown's counsel argued that his client was intoxicated at the time of his confession. As set out above, Brown testified that he consumed a considerable amount of alcohol and several marijuana cigarettes on the day of his arrest and confession. Brown's counsel apparently concluded that intoxication was a better means to exclude the confession than Brown's state of mind, especially in light of the psychological report determining Brown was competent. Although we recognize that the legal standards for competency to stand trial are different from the standards to waive *Miranda* rights,¹⁹ Brown's

¹³ *Knapp, supra*.

¹⁴ *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

¹⁵ *Knapp, supra*.

¹⁶ *Id.* at 385-386.

¹⁷ *Id.* at 386-387 n 7.

¹⁸ *People v Newton (After Remand)*, 179 Mich App 484, 493; 446 NW2d 487 (1989).

¹⁹ Compare MCL 330.2020 with *Daoud, supra* at 636-639.

trial counsel apparently determined that if he could not show that Brown lacked the state of mind to waive his *Miranda* rights, he may not be able to have Brown deemed incompetent to stand trial, and that an insanity defense was likely unprovable.

As part of Brown's argument, he contends that his ineffective trial counsel deprived him of the ability to render a defense. While the decision not to present evidence is generally an issue of trial strategy, this Court will consider it a basis for ineffective assistance of counsel where it deprives defendant of a meaningful defense.²⁰ Here, however, Brown's assertion ignores that his trial counsel asserted a defense that the testimony of codefendant, Lacy Adrow, was the result of a plea agreement in which he had to indict others for the crime. Brown's assertion also ignores that his trial counsel asserted the defense that, other than the statements of Adrow and Brown to the police, there was no evidence linking Brown to the crime.

Because we believe Brown's counsel's actions were strategic, and because strategic actions normally cannot serve as the factual basis for an ineffective assistance of counsel claim, we reject Brown's arguments.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio

²⁰ *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995).